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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY CORTEZ,

Defendant and Appellant.

D075374

(Super. Ct. No. FSB17000452)

APPEAL from a judgment of the Superior Court of San Bernardino County, Ronald M. Christianson, Judge. Affirmed with directions to correct the abstract of judgment.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

In a joint trial with his codefendant Alexander Monjardin, a jury convicted appellant Anthony Cortez of one count of attempted murder (Pen. Code, §§ 187, subd. (a), 664)<sup>1</sup> and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true two gang- and firearm-related sentencing enhancements as to the attempted murder count. (§§ 186.22, subd. (b), 12022.53, subd. (e)(1).) The court sentenced Cortez to a term of life in prison for the attempted premeditated murder conviction plus a consecutive 25 years to life for a firearm enhancement. The jury, however, was unable to reach a verdict as to Monjardin on the charges related to the attempted murder. Cortez appeals.

As both parties agree, the prosecution's sole theory at trial was that Monjardin was the shooter and Cortez directly aided and abetted him in the attempted murder. On appeal, Cortez does not dispute his identity as one of the two individuals involved in the attempted murder. However, he asserts that because the jury could not agree Monjardin was the shooter, this court is required to assume the jury's conviction of Cortez was premised on the belief that another unidentified individual was the shooter and thus there is insufficient evidence to support his convictions.

As we shall explain, this contention contradicts established Supreme Court precedent explaining the effect of a jury's verdict, or lack thereof, as to one defendant on the appellate review of the jury's conviction of another defendant. In *People v. Palmer*

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

(2001) 24 Cal.4th 856 (*Palmer*), the Supreme Court determined that an appellate court need not reconcile two apparently inconsistent verdicts. Instead, the Court of Appeal considers each verdict on its own merit to determine whether it is supported by substantial evidence as to any rational determination of guilt, with one verdict having no effect on the review of another verdict. With these principles in mind, we conclude Cortez's challenges to the sufficiency of the evidence do not have merit.

We also reject Cortez's challenge to jury instructions concerning the gang enhancement (§ 186.22, subdivision (b)) and the substantive gang crime (§ 186.22, subdivision (a)) and his contention the trial court erred in failing to consider exercising its discretion to strike the firearm enhancement.

However, we agree with both parties that the abstract of judgment contains clerical errors. Accordingly, we affirm the judgment and remand for correction of the abstract of judgment.

#### FACTUAL AND PROCEDURAL SUMMARY

For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

The defendants in this case, Anthony Cortez—known by his gang moniker "Lucks"—and Alexander Monjardin—known by his moniker "Xsel"—are members of the Southside Verdugo Flats criminal street gang and are known to spend their days in the

parking lot of the Casa Real Apartments in San Bernardino. The parking lot was known by law enforcement as a location for narcotics sales by the gang.

The parking lot is accessible by car only from an entrance off an alley. The walls and fences surrounding the alley are covered with graffiti associated with the Southside Verdugo Flats gang. As a gang expert testified at trial, the graffiti was meant to be a "billboard" for the gang that would be noticed by anyone driving into the alley. Cortez had a history of selling drugs from the parking lot and previously told one of his customers that he did not like people coming into the apartment complex and parking lot "if they did not belong" and that he would "take care" of people that parked in the parking lot.

On January 2, 2017, the victim, Rafael Reyna, drove to the Casa Real Apartments shortly before midnight. He explained that he was going to visit some "brothers" who lived in the building. He pulled into the parking lot, saw someone with a gun, and felt a "bad vibe." As he attempted to pull out of the parking lot, he remembered hearing the back window of his car "pop" following two gunshots and then he blacked out. The second shot hit Reyna in the back of his head and, although he ultimately survived, he underwent multiple surgeries and months of therapy, and suffers from permanent vision loss.

The apartment manager, who lived at the Casa Real Apartments, was on site the night of Reyna's shooting and heard the gunshots. The day after the shooting, the manager provided the police with security camera video from the previous night. The manager reviewed the security video footage with the police and identified the two men

involved as Cortez and Monjardin. He was able to specifically identify Cortez because he walks with a limp due to an earlier accident in which he shot himself in the leg. The manager told the police he had known Cortez for multiple years and had seen him in the parking lot many times, where he would "hang out" with Monjardin. A police officer who interviewed the manager testified that the manager was confident in the identification, which he made "without hesitation."

The security video shows Reyna pulling into the parking lot, where he was immediately met by Monjardin and then Cortez. Reyna pulled his car further into the parking lot, followed by the two men. Cortez and Monjardin stood at Reyna's window and talked to him for about 10 seconds before Reyna started to reverse out of the parking lot. The two men paused for a moment, with Monjardin turning his head to say something to Cortez, before both began following Reyna's car. Monjardin then pulled out a gun and fired twice at Reyna's car as it drove away.

During the entire incident, Cortez stood next to, and then followed, Monjardin as he walked away after the shooting. Monjardin approached an idling SUV driven by another unidentified person, appeared to place an object inside the vehicle, and then ran off in one direction while Cortez left in a different direction. The SUV then drove away and other men who were in the parking lot, but also unidentified, quickly left in different directions.

The manager confirmed that Cortez and Monjardin were in the parking lot every day preceding the shooting. Another man, David D., was interviewed by the police on the day after the shooting. David D. stated that he had seen both Cortez and Monjardin in

the Casa Real parking lot on the night of the shooting when he was attempting to purchase drugs from Cortez but did not have enough money. David D. attempted to buy drugs from Cortez again the day after the shooting, but Cortez sent him a text message that he wasn't around. David D. told the police it was strange for Cortez to not be available. He also stated that Cortez always had a gun in his possession.<sup>2</sup>

The police could not locate any shell casings following the shooting, suggesting the gun used may have been a revolver. A subsequent search of Monjardin's residence located two handguns, neither of which was a revolver. However, the police discovered a tool used to quickly load a revolver and a bag full of shell casings.

When the police searched Monjardin's residence, they found Cortez hiding in a bedroom. Following his arrest, Cortez consented to an interview, but initially told the police that although he heard there was a shooting, he was not present. After repeatedly denying he was present, he changed his story after learning the police had the security video. He eventually admitted he was present but claimed he did not know anything else about the shooting. He then changed his story again, admitting he approached Reyna's car, but told the police he did so because he thought it might be his friend coming to pick him up to go to work. Cortez at one point told the police that Reyna was attempting to buy drugs, but then recanted and said Reyna started to pull out of the lot without saying

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<sup>2</sup> David D. was called as a witness at trial and denied knowing Cortez or Monjardin and denied making these statements to the police or claimed he could not recall what he said. He claimed to have a "short-term memory" and claimed, "I don't recall nothing."

anything. He later told the police that the shooting was a "show" but did not answer when asked what he meant by that.

At trial, a law enforcement officer testifying as a gang expert explained the activities of the Southside Verdugo Flats gang, also known as the Flats or Southside Flats. The officer testified that the gang was involved in the sale of narcotics, firearms, and stolen property. The gang also commits violent crimes against others to establish its reputation and to intimidate the community into not cooperating with law enforcement. The officer testified about the gang's use of graffiti to mark its territory and to warn any visitors that they are now in gang territory and must follow the gang's rules.

The expert opined that Cortez and Monjardin were both active members of the Southside Verdugo Flats criminal street gang. The expert also opined, based on the testimony at trial and his review of the security video, that the shooting of Reyna was committed for the benefit of the gang. As explained by the expert, a person coming into gang territory uninvited may be perceived as a sign of disrespect, triggering an obligation for gang members to do "whatever they need to do to get rid of the intruder."

The jury found Cortez guilty of attempted murder. The jury further found that the attempted murder was (1) deliberate and premeditated; (2) committed for the benefit of, at the direction of, or in association with a criminal street gang; and (3) the principal to the offense personally and intentionally discharged a firearm during the commission of the offense, resulting in great bodily injury to the victim. The jury also found Cortez guilty of the separate offense of active participation in a criminal street gang in violation of section 186.22, subdivision (a). The jury was unable to reach a verdict as to

Monjardin in regard to the attempted murder offense, but convicted him of other offenses committed at a different time and location that did not directly involve Cortez.<sup>3</sup>

At the sentencing hearing, the court imposed an indeterminate term of life in prison for the attempted murder conviction, plus a consecutive 25 years to life for the firearm enhancement. The court stayed the additional term of three years for the street terrorism conviction and other enhancements. Cortez filed a timely notice of appeal.

## DISCUSSION

### *I. The Effect of the Jury's Inability to Reach a Verdict as to Monjardin*

The central premise of Cortez's challenge to his convictions is his belief that the jury's inability to reach a verdict as to Monjardin undermines the sufficiency of the evidence supporting his convictions. On appeal, Cortez does not dispute his identity as one of the two individuals involved in the shooting. He also correctly claims it was undisputed that he was not the shooter. Instead, he relies on the jury's inability to reach a verdict as to Monjardin to suggest the jury concluded the shooter was another unidentified individual, and argues that without evidence of that person's identity the jury's verdicts as to Cortez are not supported by substantial evidence. In essence, Cortez maintains this court must reconcile the jury's verdicts to assure each is consistent with the other.

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<sup>3</sup> After receiving the verdicts as to Cortez, the court declared a mistrial as to Monjardin and the jury foreperson disclosed they were split 10-2 in favor of finding Monjardin guilty of attempted murder.



Contrary to appellant's assertion, our review of the judgment against Cortez is not affected by the jury's inability to reach a verdict as to his codefendant. Instead, we are tasked with determining the sufficiency of the evidence to support the jury's verdict as to Cortez without regard to the jury's resolution of other counts as they relate to Monjardin.

In *Palmer, supra*, 24 Cal.4th 856, two defendants were charged with attempted premeditated murder of one victim and conspiracy to murder another victim. (*Id.* at pp. 859-860.) The codefendants were tried together with separate juries. (*Ibid.*) One defendant, Price, was found guilty of both charges, whereas the other codefendant, Palmer, was found not guilty of conspiracy and the jury found the premeditation allegation as to the attempted murder charge not true. (*Ibid.*) On appeal, Price argued "that, because it takes at least two to conspire, the verdict finding Palmer, his only alleged coconspirator, not guilty of conspiracy is inconsistent with his conviction for the same conspiracy." (*Id.* at p. 860.)

The Supreme Court acknowledged the inconsistency, but held both could be given effect. As the court explained, "[t]he law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence." (*Palmer, supra*, 24 Cal.4th at p. 860.) The court recognized that pursuant to section 954, the acquittal of one codefendant normally will not require acquittal of another. (*Palmer*, at p. 861.) Accordingly, the court concluded that "Price's verdict must stand or fall on its own merit, not in comparison to Palmer's." (*Id.* at p. 865.) The court concluded: "Price does not claim that any of his jury's verdicts,

including the conspiracy conviction, lacks evidentiary support. Accordingly, the Court of Appeal correctly affirmed the conspiracy conviction even though it is logically inconsistent with Palmer's acquittal of that conspiracy." (*Id.* at p. 866.)

Holding that inconsistent verdicts can be upheld, the court in *Palmer* noted that "[t]he United States Supreme Court has embraced this general rule [giving effect to inconsistent verdicts]. 'Inconsistency in a verdict is not a sufficient reason for setting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one defendant, [citation], and also with respect to verdicts that treat codefendants in a joint trial inconsistently, [citation].' " (*Palmer, supra*, 24 Cal.4th at pp. 860, 861, quoting *Harris v. Rivera* (1981) 454 U.S. 339, 345, fns. omitted.)

Rather than invalidating inconsistent verdicts, the *Palmer* court instructed that appellate review of judgments should follow the normal review for sufficiency of the evidence. " '[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt. We do not believe that further safeguards against jury

irrationality are necessary.' " (*Palmer, supra*, 24 Cal.4th at pp. 863-864, quoting *United States v. Powell* (1984) 469 U.S. 57, 67.)

Following the direction of *Palmer*, our review of Cortez's convictions is not dictated by the jury's failure to reach a verdict as to Monjardin. Instead, we review Cortez's convictions to determine whether they are supported by substantial evidence.

## II. *Sufficiency of Evidence*

Cortez challenges the sufficiency of the evidence to support both the conviction for attempted murder and the conviction for active participation in a criminal street gang. Setting aside the jury's verdict as to Monjardin for the reason discussed above, we hold the jury's verdicts are supported by substantial evidence.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

" ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must

accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citation.] " ' " (*Smith, supra*, 37 Cal.4th at p. 739.)

"In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. [Citations.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]' [Citation.] ' "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." ' " (*People v. Thomas* (1992) 2 Cal.4th 489, 514 (*Thomas*).)

#### *A. Attempted First Degree Murder*

As both parties agree, Cortez was tried under a direct aider and abettor theory of liability for attempted murder. "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561; accord, *People v. Avila* (2006) 38 Cal.4th 491, 564.) " '[T]o be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's

accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054 (*Nguyen*).)

Reviewing the evidence in the light most favorable to the judgment, we conclude the evidence was sufficient to support the jury's verdict. First, we consider "the direct perpetrator's actus reus—a crime committed by the direct perpetrator." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Cortez does not dispute that Reyna was shot by his accomplice, but contends that the evidence was insufficient to show that the shooting was deliberate and premeditated.

"A crime is premeditated when it is considered beforehand and deliberate when the decision to commit the crime is formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 886.)

" ' "In *People v. Anderson* [(1968)] 70 Cal.2d [15,] 26-27. . . , [the Supreme Court] identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in *People v. Pride* (1992) 3 Cal.4th 195, 247 . . . : '*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" Thus, while premeditation and deliberation must result from ' "careful

thought and weighing of considerations" ' (70 Cal.2d at p. 27), we continue to apply the principle that '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." ' ' ' ' ' ' ' ' ( *People v. Manriquez* (2005) 37 Cal.4th 547, 577.) "The *Anderson* guidelines were formulated as a synthesis of prior case law, and are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case." ( *People v. Hawkins* (1995) 10 Cal.4th 920, 957.)

Cortez focuses on the seemingly arbitrary nature of the shooting to suggest it was not premeditated. The video shows no sign of provocation by Reyna, who testified that he started to leave because he felt a "bad vibe" after seeing a person with a gun in the parking lot. After Cortez admitted to being present, he ultimately told the police that Reyna didn't "do anything" to cause him to be shot. Relying on this evidence, Cortez argues on appeal that he and Monjardin did not know Reyna and "he did nothing in the parking lot to trigger the shooting. . . . He merely drove into the lot and started to drive away when the shooter fired into the back of his car. This shooting had nothing to do with Reyna." Thus, Cortez contends, there could not have been a plan to attempt to murder Reyna, suggesting the attempt was not premeditated.

This contention, however, supports the *opposite* conclusion. "The utter lack of provocation by the victim is a strong factor supporting the conclusion that appellant's attack was deliberately and reflectively conceived in advance." ( *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102.) "This manner of killing, a close-range shooting without

any provocation or evidence of a struggle, reasonably supports an inference of premeditation and deliberation." (*People v. Thompson* (2010) 49 Cal.4th 79, 114-115.)

The evidence also supports the conclusion that both Monjardin and Cortez had a motive to attempt to kill Reyna. Generally, gang evidence is often relevant to motive. (*See, e.g., People v. Williams* (1997) 16 Cal.4th 153, 193-194.) Although gang evidence standing alone cannot prove a defendant is an aider and abettor, it can be used to strengthen inferences to be drawn from other evidence. (*Nguyen, supra*, 61 Cal.4th at p. 1055.)

Here, a gang expert testified that the parking lot where the shooting occurred was an area known for narcotics sales by the Southside Verdugo Flats gang. Monjardin and Cortez, both admitted gang members, spent their days in the parking lot. As Cortez told one of his narcotics customers, it was a problem when people came into the parking lot "if they did not belong." A gang expert testified that if someone enters gang territory where he or she is perceived to not belong, it can be taken as a sign of disrespect. The gang as a whole benefits from acts of violence in its territory by enhancing its reputation and making it less likely that community members will cooperate with law enforcement. The gang member committing the violent crime also directly benefits, both through an enhanced reputation and other direct rewards, such as money or free drugs.

Finally, there was evidence that the shooting was planned. "Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief." (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) As mentioned above, Cortez complained about strangers entering the parking

lot and his plan to "take care" of intruders. The security video footage demonstrates that Monjardin did not need to retrieve a gun before shooting Reyna; he was already carrying a handgun. The video also shows that after Reyna began to slowly back out of the parking lot, Monjardin and Cortez paused, appeared to communicate, and then slowly followed Reyna's car. Next, Monjardin points at Reyna with his left hand, then aims his gun with his right hand, and shoots twice at Reyna's car. Able to see these events unfold on the security video, the jury could conclude that Monjardin had ample time to deliberate and plan the shooting.

Similarly, the evidence supports the jury's conclusion that Cortez aided and abetted the attempted murder. "When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

"Evidentiary considerations which are probative of whether one is an aider and abettor include presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime." (*People v. Jones* (1980) 108 Cal.App.3d 9, 15.) However, mere presence at the scene of the crime and failure to take steps to prevent the crime do not, standing alone, establish aider and abettor liability. (*Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 287.)



Cortez does not dispute he was present at the scene. Moreover, the evidence at trial demonstrated that Cortez was not merely present when Reyna was shot. From just moments after Reyna arrived, Monjardin and Cortez acted in concert. As the gang expert testified, both Monjardin and Cortez "were standing there together. They're in tandem. When the victim's car pulled up, you see both the subjects walking to the car together in tandem and then [it] looks like there might have been some words exchanged, and shortly after the person with the firearm points and shoots at the victim. [¶] The thing that stands out to me . . . [Cortez] stays there until the shooting is completed. Typically, you know, when a shooting occurs, we'll see victims on video. We'll see victims or witnesses. We'll see them run and flee the scene because of the inherent danger that's there at the scene. However, [Cortez] stood there until after the shooting was completed."

The expert explained the purpose of Cortez's actions: "Prior to the shooting he's in the parking lot. I believe he was acting as a lookout. . . . [¶] He stays there as a lookout so when the shooting occurs he's there. He's able to see other things the shooter may not see such as witnesses, other potential threats that are coming towards them, law enforcement. He's able to see those things."

Cortez's actions after the shooting also support the interference that he intended to aid and abet the shooting. Cortez did not attempt to stop the shooting and did not flee. Instead, he calmly walked back alongside Monjardin toward a waiting car. Approximately one week after the shooting, the police searched Monjardin's home, where they found Cortez in a bedroom near a loaded handgun. All of this evidence, considered together, supports the conclusion that Monjardin and Cortez were close associates who

worked together through all stages of the offense. The jury could reasonably rely on this evidence to find Cortez aided and abetted the attempted murder of Reyna.

### *B. Active Participation in a Criminal Street Gang*

Cortez also challenges the sufficiency of the evidence to support his conviction for active participation in a criminal street gang. "The elements of the gang participation offense in section [186.22, subdivision (a)] are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by *members* of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).)

In *Rodriguez*, the Supreme Court interpreted the third element of section 186.22, subdivision (a) and stated, "[T]o satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct." (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) The court also concluded, "The plain meaning of section [186.22, subdivision (a)] requires that felonious criminal conduct be committed *by at least two gang members*, one of whom can include the defendant if he is a gang member." (*Rodriguez*, at p. 1132, italics added; see also *id.* at p. 1138 ["with section [186.22, subdivision (a)], the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony"].)

On appeal, Cortez challenges only the evidence relating to this third element. He does not argue there is insufficient evidence he was a member of the Southside Verdugo

Flats criminal street gang, but contends that the jury's inability to reach a verdict as to Monjardin's involvement in the shooting demonstrates the prosecution failed to prove that another gang member participated in the shooting with Cortez. However, as discussed above, the jury's verdict, or lack thereof, in regard to Monjardin does not affect our review of the jury's verdict as to Cortez to the extent Cortez contends we must reconcile the jury's actions.

As Cortez acknowledges, and as discussed above, his gang participation conviction was premised on the prosecution's contention that he acted in concert with Monjardin in the attempted murder of Reyna. We review the jury's verdict finding Cortez guilty pursuant to this theory to determine whether it is supported by substantial evidence.

The question, therefore, is whether the prosecution presented sufficient evidence to support its theory at trial that the shooter, Monjardin, was an active gang member. On this point, the jury was presented with ample evidence. The apartment manager testified that he knew both Cortez and Monjardin, who were a constant presence in the apartment complex parking lot. When the manager reviewed the security video with the police, he was confident that it showed Cortez and Monjardin to be the participants in the shooting. Monjardin was a self-admitted member of the same gang as Cortez, Southside Verdugo Flats. As set forth in the statement of facts, the jury was presented with additional evidence not addressed by Cortez on appeal that adequately demonstrated Monjardin was an active member of the Southside Verdugo Flats street gang.

Based on our review of the entire record in accordance with the appropriate standard of review, we conclude a reasonable jury could have reached a verdict finding that Cortez acted in concert with Monjardin, another active gang member, in committing the attempted murder such that the conviction must be affirmed. Cortez's reliance on the jury's inability to reach a verdict as to Monjardin does not require a different result.

## *II. Instructional Error*

Cortez next challenges the "confusing juxtaposition" of the jury instructions regarding the substantive offense of active participation in a criminal street gang under section 186.22, subdivision (a) and the separate gang sentencing enhancement pursuant to subdivision (b) of the same section. Whereas the substantive offense requires the prosecution to show that Cortez is an active member of a street gang, the sentencing enhancement does not require that Cortez himself is a gang member, but only that he intended to assist, further, or promote criminal conduct by a gang member. Cortez contends the jury may have been confused and found him guilty of the substantive offense without making the necessary finding that he is an active gang member by following the instruction regarding the sentence enhancement.

As Cortez admits, his counsel at trial did not object to the instruction or otherwise seek clarification. He also agrees on appeal that "both instructions appear to have been independently correct in law."

"Generally, a party may not complain on appeal about a given instruction that was correct in law and responsive to the evidence unless the party made an appropriate objection." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087; see *People v. Hudson*

(2006) 38 Cal.4th 1002, 1011-1012; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We may nevertheless review a claimed instructional error despite a defendant's failure to object if the claimed error "affect[s] the substantial rights of the defendant." (*Andersen*, at p. 1249; see § 1259 ["The appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) " 'In this regard, "[t]he cases equate 'substantial rights' with reversible error" under the test stated in *People v. Watson* (1956) 46 Cal.2d 818 . . . . ' " (*People v. Cardona* (2016) 246 Cal.App.4th 608, 612.) In other words, a defendant's substantial rights are affected when the claimed error "resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error." (*Andersen*, at p. 1249.) This analysis "necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*Ibid.*)

To avoid a claim of forfeiture, Cortez contends the instructions were so confusing that they affected his substantial rights resulting in a miscarriage of justice; or, alternatively, that his trial counsel was ineffective. Under either claim, we must determine whether a reversal is warranted under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, which considers whether it appears reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465; *People v. Mai* (2013) 57 Cal.4th 986, 1009.)

We reject Cortez's contention that the instructions were confusing. However, even if we were to assume the juxtaposition of the instructions may have confused the jury and counsel was ineffective for failing to object, Cortez fails to demonstrate any prejudice. Cortez's theory of prejudicial error is premised on the contention that a reasonable jury might have found Cortez to *not* be an active member of a criminal street gang. The record, however, offers no support for such a contention. Among other evidence of his current involvement, Cortez admitted to a police officer only one year before the shooting that he was a member of the Southside Verdugo Flats criminal street gang. He has multiple gang tattoos on his body. His social media account included pictures showing Cortez with other identified gang members "throwing up" known gang signs. Cortez was known to spend his days in the Casa Real Apartments parking lot, a location within the territory of the Southside Verdugo Flats gang and surrounded by gang-related graffiti, including tagging of Cortez's gang moniker.

Considering the totality of the evidence, it is not reasonably probable that any clarification of the jury instructions would have led to a different result because Cortez's gang status was never seriously in doubt. Even assuming the jury was confused by the instructions—a contention belied by the plain language of the instructions—Cortez fails to offer anything more than abstract speculation that the result would have been more favorable absent the alleged confusion. Accordingly, the instructions given to the jury do not warrant a reversal of the judgment.

### III. *The Trial Court's Discretion to Strike the Firearm Enhancement*

Cortez next contends that a reversal is warranted to remand to the trial court to consider whether to strike the firearm enhancement imposed pursuant to section 12022.53, subdivision (e). Recent legislation, which took effect on January 1, 2018, granted trial courts the discretion to strike this firearm enhancement in the "interest of justice." (See, e.g., *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)

Cortez was sentenced on January 23, 2018, after the effective date of the new legislation. His counsel did not ask the trial court to strike the firearm enhancement and the court did not act sua sponte to strike the enhancement.

On appeal, Cortez speculates that absent a showing on the record that the trial court understood it was newly vested with discretion to strike the enhancement, it is "abundantly clear" the court did not consider striking the enhancement. In essence, Cortez asks this court to imply the trial court failed to follow the law in effect at the time of sentencing based only on the silence of the record to suggest otherwise.

This contention is contrary to established principles of appellate review. Absent concrete evidence to the contrary, we presume the trial court knew, and correctly applied, the law. (*People v. Thomas* (2011) 52 Cal.4th 336, 361.) "[I]n light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of that discretion." (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527; see also *People v. Moran* (1970) 1 Cal.3d

755, 762; Evid. Code, § 664.) Without any evidence to the contrary, we conclude the trial court was aware of its discretion and declined to strike the firearm enhancement.

In the alternative, Cortez contends his counsel was ineffective for presumably not knowing the law and failing to request that the enhancement be stricken or otherwise object. "The standards for ineffective assistance of counsel claims are well established. 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' [Citation.] To establish a meritorious claim of ineffective assistance, defendant 'must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations] or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors . . . or omissions, the trial would have resulted in a more favorable outcome. [Citations.]' " (*People v. Prieto* (2003) 30 Cal.4th 226, 261 (*Prieto*).)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) " 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' " (*People v. Freeman* (1994) 8 Cal.4th 450, 484.) "When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of



representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [citation], the contention must be rejected." (*People v. Jackson* (1989) 49 Cal.3d 1170, 1188 (*Jackson*).)

"It is well settled that counsel is not ineffective in failing to make an objection when the objection would have likely been overruled by the trial court." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924; *Prieto, supra*, 30 Cal.4th at p. 261 ["[C]ounsel's decision to forgo implausible arguments or objections does not constitute deficient performance."].) "We may assume that counsel had knowledge of the legal principles involved and we cannot fault him for failing to make what would have been a fruitless objection." (*Jackson, supra*, 49 Cal.3d at p. 1189; see *People v. Price* (1991) 1 Cal.4th 324, 387.)

As discussed above, we presume the trial court was aware of its discretion to strike the firearm enhancement and declined to do so. Certainly nothing in the record suggests the court would be inclined to strike the enhancement. Thus, absent any evidence to the contrary, we presume that any request by Cortez's counsel for the trial court to strike the enhancement would have been futile and reject Cortez's contention to the contrary.

#### IV. Clerical Errors in the Abstract of Judgment

Finally, Cortez contends, and the Attorney General agrees, that the abstract of judgment contains the following clerical errors that should be corrected:

(1) The abstract of judgment for the determinate term includes sentencing enhancements pursuant to section 12022.53, subdivisions (b) and (c) but the jury did not

make a true finding as to those enhancements. The mention of a sentence of those enhancements on the abstract, although stayed, should be stricken.

(2) The abstract of judgment for the determinate term references the jury's section 186.22, subdivision (b) enhancement true finding as a substantive offense rather than a sentencing enhancement. The abstract should be amended to reflect this is a sentence enhancement, in regard to the attempted murder conviction, that was imposed but stayed by the trial court.

(3) The abstract of judgment for the determinate term lists a sentence of 25 years under section 8 of the abstract form in contradiction to the rest of the abstract, which reflects that there was no determinate term imposed but not stayed. This reference to an imposed determinate term should be deleted.

(4) The abstract of judgment for the indeterminate term references the sentencing enhancement imposed pursuant to section 12022.53, but does not state which specific enhancement was imposed. The abstract should be corrected to specify that the enhancement was imposed pursuant to subdivision (e) of section 12022.53.

## DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment consistent with this opinion and forward a certified copy to the Department of Corrections and Rehabilitation.

HALLER, Acting P.J.

WE CONCUR:

IRION, J.

DATO, J.